

SENATE BILL NO. 20

INTRODUCED BY L. JENT

BY REQUEST OF THE STATE ADMINISTRATION AND VETERANS' AFFAIRS INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING A STATEMENT OF LEGISLATIVE PURPOSE FOR THE MONTANA ADMINISTRATIVE PROCEDURE ACT; CLARIFYING THE MEANING OF THE TERM "SUBSTANTIAL COMPLIANCE"; AMENDING SECTION SECTIONS 2-4-101 AND 2-4-305, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, on November 6, 2007, the Montana Supreme Court issued its opinion in the case of Montana Society of Anesthesiologists v. Montana Board of Nursing, 2007 MT 290, 339 Mont. 472, 171 P.3d 704 (2007) (MSA opinion), holding that a nurse anesthetist may practice without direct supervision by an anesthesiologist M.D.; and

WHEREAS, the Montana Society of Anesthesiologists (MSA) challenged the legality of an administrative rule adopted by the Montana Board of Nursing, alleging, among other things, that the rule was adopted without a sufficient statement of reasonable necessity, as required by section 2-4-305(6)(b), MCA, of the Montana Administrative Procedure Act (MAPA); ~~and the Montana Board of Nursing admitted that the statement was legally deficient in that it did not state what the reasonable necessity was for a portion of the rule challenged by the MSA; and~~

WHEREAS, in the MSA opinion, the Montana Supreme Court held that because MAPA, in section 2-4-305(7), MCA, requires that rules must be adopted in "substantial compliance" with MAPA and because the Montana Supreme Court had previously held that substantial compliance has occurred if the purpose of MAPA has been fulfilled, the defective notice of proposed rulemaking substantially complied with MAPA because the purpose of MAPA is to give public notice of the adoption of a rule and that adequate notice had been given by the Board of Nursing; and

~~WHEREAS, because the purpose of MAPA, as determined by the Montana Supreme Court, is likely to never change and because every notice of proposed rulemaking gives some notice of a proposed rule adoption, amendment, or repeal and thereby substantially complies with the purpose of MAPA, as determined by the Montana Supreme Court, it is likely that notices of proposed rulemaking with a defective or missing statement of reasonable necessity would always be approved by the Montana Supreme Court under the rationale of the MSA opinion because those notices always fulfill the purpose of MAPA; and~~

~~WHEREAS, readers of a statement of a notice of proposed rulemaking that did not contain a statement of reasonable necessity would never know whether a necessity for the proposed rule exists; and~~

~~WHEREAS, the routine adoption of rules without a showing of necessity may lead to the adoption of rules for which there is no necessity; and~~

~~WHEREAS, the Legislature believes it to be bad public policy for Executive Branch agencies to adopt rules for which there is a defective or missing statement of reasonable necessity; and~~

~~WHEREAS, a statement in MAPA that the purpose of an individual section of MAPA is shown in the language of that section itself, as supplemented by the application of the rules of statutory construction, will prospectively reverse the Montana Supreme Court's MSA opinion; and~~

~~WHEREAS, it is therefore the intent of the Legislature that this bill be applied to reverse the effect of the Montana Supreme Court's opinion in Montana Society of Anesthesiologists v. Montana Board of Nursing as it applies to statements of reasonable necessity required by section 2-4-305(6)(b), MCA;~~

WHEREAS, UNDER THE RATIONALE EMPLOYED BY THE MONTANA SUPREME COURT IN THE MSA OPINION, EVERY RULE ADOPTED BY AN AGENCY COULD BE FOUND TO BE IN "SUBSTANTIAL COMPLIANCE" WITH MAPA SINCE EVERY NOTICE OF PROPOSED RULEMAKING GIVES SOME NOTICE OF A PROPOSED RULE ADOPTION, AMENDMENT, OR REPEAL; AND

WHEREAS, THE LEGISLATURE INTENDS THAT A DETERMINATION OF WHETHER MAPA'S "SUBSTANTIAL COMPLIANCE" REQUIREMENT IN SECTION 2-4-305(7), MCA HAS BEEN SATISFIED REQUIRES AN ANALYSIS OF MORE THAN WHETHER AN AGENCY PROVIDED ADEQUATE PUBLIC NOTICE OF ITS PROPOSED RULE, BUT RATHER REQUIRES AN ANALYSIS OF WHETHER THE AGENCY COMPLIED WITH 2-4-302, 204-303, OR 2-4-306 AND 2-4-307; AND

WHEREAS, ADOPTION OF [THIS ACT] IS NOT INTENDED BY THE LEGISLATURE AS A COMMENT UPON THE OUTCOME OF THE MSA OPINION, BUT RATHER IS INTENDED TO CHANGE THE ANALYSIS USED BY THE COURTS IN THE FUTURE WHEN DETERMINING WHETHER MAPA'S "SUBSTANTIAL COMPLIANCE" REQUIREMENT, FOUND IN SECTION 2-4-305(7), MCA, HAS BEEN SATISFIED IN FUTURE CASES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 2-4-101, MCA, is amended to read:

"2-4-101. Short title -- purpose. (1) This chapter ~~shall be~~ is known and may be cited as the "Montana Administrative Procedure Act".

(2) ~~One purpose~~ THE PURPOSES of the Montana Administrative Procedure Act ~~is~~ ARE to:

(A) generally give notice to the public of governmental action and to provide for public participation in that action;

(B) ESTABLISH GENERAL UNIFORMITY AND DUE PROCESS SAFEGUARDS IN AGENCY RULE MAKING, LEGISLATIVE REVIEW OF RULES, AND CONTESTED CASE PROCEEDINGS;

(C) ESTABLISH STANDARDS FOR JUDICIAL REVIEW OF AGENCY RULES AND FINAL AGENCY DECISIONS;

(D) PROVIDE THE EXECUTIVE AND JUDICIAL BRANCHES OF GOVERNMENT WITH STATUTORY DIRECTIVES, CONSISTENT WITH THE POWERS OF THE THREE BRANCHES OF GOVERNMENT ESTABLISHED BY THE MONTANA CONSTITUTION. However, the purpose of a specific section or subsection of law within the act is demonstrated by the language of that section or subsection, as supplemented by the application of the rules of statutory construction.

(3) A RULE IS PRESUMPTIVELY INVALID IF PROMULGATION OF THE RULE FAILED TO COMPLY WITH 2-4-305(6)(B)."

NEW SECTION. Section 2. SECTION 2-4-305, MCA, IS AMENDED TO READ:

"2-4-305. REQUISITES FOR VALIDITY -- AUTHORITY AND STATEMENT OF REASONS. (1) THE AGENCY SHALL FULLY CONSIDER WRITTEN AND ORAL SUBMISSIONS RESPECTING THE PROPOSED RULE. UPON ADOPTION OF A RULE, AN AGENCY SHALL ISSUE A CONCISE STATEMENT OF THE PRINCIPAL REASONS FOR AND AGAINST ITS ADOPTION, INCORPORATING IN THE STATEMENT THE REASONS FOR OVERRULING THE CONSIDERATIONS URGED AGAINST ITS ADOPTION. IF SUBSTANTIAL DIFFERENCES EXIST BETWEEN THE RULE AS PROPOSED AND AS ADOPTED AND THE DIFFERENCES HAVE NOT BEEN DESCRIBED OR SET FORTH IN THE ADOPTED RULE AS THAT RULE IS PRINTED IN THE REGISTER, THE DIFFERENCES MUST BE DESCRIBED IN THE STATEMENT OF REASONS FOR AND AGAINST AGENCY ACTION. WHEN WRITTEN OR ORAL SUBMISSIONS HAVE NOT BEEN RECEIVED, AN AGENCY MAY OMIT THE STATEMENT OF REASONS.

(2) RULES MAY NOT UNNECESSARILY REPEAT STATUTORY LANGUAGE. WHENEVER IT IS NECESSARY TO REFER TO STATUTORY LANGUAGE IN ORDER TO CONVEY THE MEANING OF A RULE INTERPRETING THE LANGUAGE, THE REFERENCE MUST CLEARLY INDICATE THE PORTION OF THE LANGUAGE THAT IS STATUTORY AND THE PORTION THAT IS AN AMPLIFICATION OF THE LANGUAGE.

(3) EACH PROPOSED AND ADOPTED RULE MUST INCLUDE A CITATION TO THE SPECIFIC GRANT OF RULEMAKING AUTHORITY PURSUANT TO WHICH THE RULE OR ANY PART OF THE RULE IS ADOPTED. IN ADDITION, EACH PROPOSED AND ADOPTED RULE MUST INCLUDE A CITATION TO THE SPECIFIC SECTION OR SECTIONS IN THE MONTANA CODE ANNOTATED THAT THE RULE PURPORTS TO IMPLEMENT. A SUBSTANTIVE RULE MAY NOT BE PROPOSED OR ADOPTED UNLESS:

(A) A STATUTE GRANTING THE AGENCY AUTHORITY TO ADOPT RULES CLEARLY AND SPECIFICALLY LISTS THE SUBJECT MATTER OF THE RULE AS A SUBJECT UPON WHICH THE AGENCY SHALL OR MAY ADOPT RULES; OR

(B) THE RULE IMPLEMENTS AND RELATES TO A SUBJECT MATTER OR AN AGENCY FUNCTION THAT IS CLEARLY AND SPECIFICALLY INCLUDED IN A STATUTE TO WHICH THE GRANT OF RULEMAKING AUTHORITY EXTENDS.

(4) EACH RULE THAT IS PROPOSED AND ADOPTED BY AN AGENCY AND THAT IMPLEMENTS A POLICY OF A GOVERNING BOARD OR COMMISSION MUST INCLUDE A CITATION TO AND DESCRIPTION OF THE POLICY IMPLEMENTED. EACH AGENCY RULE IMPLEMENTING A POLICY AND THE POLICY ITSELF MUST BE BASED ON LEGAL AUTHORITY AND OTHERWISE COMPLY WITH THE REQUISITES FOR VALIDITY OF RULES ESTABLISHED BY THIS CHAPTER.

(5) TO BE EFFECTIVE, EACH SUBSTANTIVE RULE ADOPTED MUST BE WITHIN THE SCOPE OF AUTHORITY CONFERRED AND IN ACCORDANCE WITH STANDARDS PRESCRIBED BY OTHER PROVISIONS OF LAW.

(6) WHENEVER BY THE EXPRESS OR IMPLIED TERMS OF ANY STATUTE A STATE AGENCY HAS AUTHORITY TO ADOPT RULES TO IMPLEMENT, INTERPRET, MAKE SPECIFIC, OR OTHERWISE CARRY OUT THE PROVISIONS OF THE STATUTE, AN ADOPTION, AMENDMENT, OR REPEAL OF A RULE IS NOT VALID OR EFFECTIVE UNLESS IT IS:

(A) CONSISTENT AND NOT IN CONFLICT WITH THE STATUTE; AND
(B) REASONABLY NECESSARY TO EFFECTUATE THE PURPOSE OF THE STATUTE. A STATUTE MANDATING THAT THE AGENCY ADOPT RULES ESTABLISHES THE NECESSITY FOR RULES BUT DOES NOT, STANDING ALONE, CONSTITUTE REASONABLE NECESSITY FOR A RULE. THE AGENCY SHALL ALSO ADDRESS THE REASONABLENESS COMPONENT OF THE REASONABLE NECESSITY REQUIREMENT BY, AS INDICATED IN 2-4-302(1) AND SUBSECTION (1) OF THIS SECTION, STATING THE PRINCIPAL REASONS AND THE RATIONALE FOR ITS INTENDED ACTION AND FOR THE PARTICULAR APPROACH THAT IT TAKES IN COMPLYING WITH THE MANDATE TO ADOPT RULES. SUBJECT TO THE PROVISIONS OF SUBSECTION (8), REASONABLE NECESSITY MUST BE CLEARLY AND THOROUGHLY DEMONSTRATED FOR EACH ADOPTION, AMENDMENT, OR REPEAL OF A RULE IN THE AGENCY'S NOTICE OF PROPOSED RULEMAKING AND IN THE WRITTEN AND ORAL DATA, VIEWS, COMMENTS, OR TESTIMONY SUBMITTED BY THE PUBLIC OR THE AGENCY AND CONSIDERED BY THE AGENCY. A STATEMENT THAT MERELY EXPLAINS WHAT THE RULE PROVIDES IS NOT A STATEMENT OF THE REASONABLE NECESSITY FOR THE RULE.

(7) A RULE IS NOT VALID UNLESS NOTICE OF IT IS GIVEN AND IT IS ADOPTED IN SUBSTANTIAL COMPLIANCE WITH 2-4-302, 2-4-303, OR 2-4-306 AND THIS SECTION AND UNLESS NOTICE OF ADOPTION OF THE RULE IS PUBLISHED WITHIN 6 MONTHS OF THE PUBLISHING OF NOTICE OF THE PROPOSED RULE. THE MEASURE OF WHETHER AN AGENCY HAS ADOPTED A RULE IN SUBSTANTIAL COMPLIANCE WITH 2-4-302, 2-4-303, OR 2-4-306 AND THIS SECTION IS NOT WHETHER THE AGENCY HAS PROVIDED NOTICE OF THE PROPOSED RULE, STANDING ALONE, BUT RATHER MUST BE BASED ON AN ANALYSIS OF THE AGENCY'S SUBSTANTIAL COMPLIANCE WITH 2-4-302, 2-4-303, OR 2-4-306 AND THIS SECTION. IF AN AMENDED OR SUPPLEMENTAL NOTICE OF EITHER PROPOSED OR FINAL RULEMAKING, OR BOTH, IS PUBLISHED CONCERNING THE SAME RULE, THE 6-MONTH LIMIT MUST BE DETERMINED WITH REFERENCE TO THE LATEST NOTICE IN ALL CASES.

(8) AN AGENCY MAY USE AN AMENDED PROPOSAL NOTICE OR THE ADOPTION NOTICE TO CORRECT DEFICIENCIES IN CITATIONS OF AUTHORITY FOR RULES AND IN CITATIONS OF SECTIONS IMPLEMENTED BY RULES. AN AGENCY MAY USE AN

AMENDED PROPOSAL NOTICE BUT, EXCEPT FOR CLERICAL CORRECTIONS, MAY NOT USE THE ADOPTION NOTICE TO CORRECT DEFICIENCIES IN A STATEMENT OF REASONABLE NECESSITY.

(9) IF A MAJORITY OF THE MEMBERS OF THE APPROPRIATE ADMINISTRATIVE RULE REVIEW COMMITTEE NOTIFY THE COMMITTEE PRESIDING OFFICER THAT THOSE MEMBERS OBJECT TO A NOTICE OF PROPOSED RULEMAKING, THE COMMITTEE SHALL NOTIFY THE AGENCY IN WRITING THAT THE COMMITTEE OBJECTS TO THE PROPOSAL NOTICE AND WILL ADDRESS THE OBJECTIONS AT THE NEXT COMMITTEE MEETING. FOLLOWING NOTICE BY THE COMMITTEE TO THE AGENCY, THE PROPOSAL NOTICE MAY NOT BE ADOPTED UNTIL PUBLICATION OF THE LAST ISSUE OF THE REGISTER THAT IS PUBLISHED BEFORE EXPIRATION OF THE 6-MONTH PERIOD DURING WHICH THE ADOPTION NOTICE MUST BE PUBLISHED, UNLESS PRIOR TO THAT TIME, THE COMMITTEE MEETS AND DOES NOT MAKE THE SAME OBJECTION. A COPY OF THE COMMITTEE'S NOTIFICATION TO THE AGENCY MUST BE INCLUDED IN THE COMMITTEE'S RECORDS."

NEW SECTION. Section 3. Effective date. [This act] is effective on passage and approval.

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